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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 81-6827

BOB REDD,

Petitioner

-v-

WALTER ZANT, WARDEN,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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ATTORNEY FOR PETITIONER

81-6827

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Georgia entered April 6, 1982, reversing the decision of the Superior Court of Butts County, Georgia, granting Petitioner's state Petition for Writ of Habeas Corpus.

CITATION TO OPINION BELOW

The decision of the Supreme Court of Georgia appears at Zant v. Redd, _____Ga._____, 290 S.E. 2d 36, and is set out in Appendix A hereto, p. A1-A5. The judgment reversed by this decision was the judgment of the Superior Court of Butts County, which judgment is attached hereto in Appendix B, p. B1-B10.

JURISDICTION

The judgment of the Supreme Court of the State of

Georgia was entered on April 6, 1982. Jurisdiction of this Court is invoked under 28 U. S. C. §1257 (3), Petitioner having asserted below and asserting before this Court deprivation of his rights secured by the Constitution of the United States of America.

QUESTIONS PRESENTED

1. Whether double jeopardy protection is afforded Petitioner as to the statutory aggravating circumstances listed in the Georgia Death Penalty Statute.

2. Whether the consideration by a second sentencing jury of statutory aggravating circumstances found not to exist by the first sentencing jury renders the application of the Georgia Death Penalty Statute to Petitioner unconstitutional under the ruling of Furman v. Georgia, Gregg v. Georgia, and the Eighth and Fourteenth Amendments to the Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States of America.

2. This case also involves the following provisions of the Code of Georgia:

Ga. Code Ann. §27-2503.

> "Presentence hearings in felony cases. (a) Except in cases in which the death penalty may be imposed, upon the return of a verdict of "guilty" by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In

such hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument. In cases in which the death penalty may be imposed, the judge when sitting without a jury shall follow the additional procedure provided in section 27-2534.1. Upon the conclusion of the evidence and arguments the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

(b) In all cases in which the death penalty

may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided in subsection (a) of this section. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in section 27-2534.1, exist and whether to recommend mercy for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law.

(Acts 1974, pp. 352, 357)."

Ga. Code Ann. §27-2534.1.

"Mitigating and aggravating circumstances; death penalty. (a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any

of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives or more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody of a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall

make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1 (b) is so found, the death penalty shall not be imposed.

(Acts 1973, pp. 159, 163.)"

STATEMENT OF THE CASE

This is a Petition for a Writ of Certiorari to review the judgment of the Supreme Court of Georgia, which judgment reversed the grant of a Writ of Habeas Corpus by the Superior Court of Butts County, Georgia. The judgment of the Supreme Court of Georgia was entered on April 6, 1982. The judgment of the Superior Court of Butts County was entered on September 1, 1982.

Petitioner was convicted of murder and kidnapping with resulting bodily injury in the Superior Court of Richmond County in a trial in February, 1977. Upon appeal to the Supreme Court of Georgia, both convictions were affirmed, but the death sentence for murder was set aside and a new trial was ordered on punishment. The opinion in this first case appears at Redd v. State, 240 Ga. 753, 243 S.E. 2d 16 (1978).

On retrial of the sentencing issue before a different jury, Petitioner was again sentenced to death for murder. The sentence was affirmed by the Supreme Court of Georgia on January 4, 1979, in Redd v. State, 242 Ga. 876, 252 S.E. 2d 383 (1979). The question presented in the present Petition

was raised as Enumeration of Error No. 6, in that case before the Supreme Court of Georgia (Enumeration of Error, Case No. 34020, Supreme Court of Georgia), and was raised in Petitioner's Petition for Writ of Certiorari which was denied; Redd v. Georgia, 422 U.S. 934, 99 S.Ct. 2870, 61 L.Ed. 2d 304 (1979).1/

Briefly stated, that question is whether a second sentencing jury in a death penalty case, may be allowed to consider statutory aggravating circumstances found not to exist by the first sentencing jury, in violation of Petitioner's protection against Double Jeopardy.

After the decision of this Court in Bullington v. Missouri, _____U.S._____, 101 S.Ct. 1852, 68 L.Ed. 2d 270 (1981), Petitioner filed a Petition for Writ of Habeas Corpus in the Superior Court of Butts County, Georgia. That court, on the basis of Bullington, granted the Petition. (Appendix B, herein). The Supreme Court of Georgia reversed, holding (Appendix A, p. A5), that "...the state acted properly in offering proof of statutory aggravating circumstances submitted to the first jury but not listed by that jury in support of the death sentence."

This Petition is to request review of that holding.

1/ After the denial by this Court of the Petition for Writ of Certiorari a Petition for Writ of Habeas Corpus was filed in the Superior Court of Tattnall County, Georgia, and was denied on April 8, 1980. This Petition did not raise the issue presented in the present case. Certificate for Probable Cause to Appeal was denied by the Supreme Court of Georgia on July 2, 1980. Petition to the U.S. Supreme Court for Writ of Certiorari was denied on November 3, 1980 (No. 80-5317).

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

At Petitioner's second sentencing trial, the jury was allowed to consider the following statutory aggravating circumstances (2T 288):

1) "The offense of murder was committed while the offender was engaged in the commission of another capital felony, kidnapping with resulting bodily injury." Ga. Code Ann. §27-2534.1 (b) (2).

2) "...the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, or depravity of mind, or an aggravated battery;" Ga. Code Ann. §27-2534.1 (b) (7).

3) "...the offensive murder was committed while the offender was engaged in the commission of another capital felony, to-wit, armed robbery;" [sic] Ga. Code Ann. §27-2534.1 (b) (2).

4) "...the offense was committed for the purpose of receiving money." Ga. Code Ann. §27-2534.1 (b) (4).

All except the last of these were given to the jury in Petitioner's first sentencing trial. (T 474).[2/] That first jury found the existence of only one statutory aggravating circumstance: "the offense of murder was committed while

---

2/ Because there are two sentencing trials in this case, the transcript for the first trial will be referred as T and the record in the first case as R; the transcript in the second case as 2T and the record in that case as 2R.

the offender was engaged in the commission of another capital felony, kidnapping with resulting bodily injury." (1R, 3).

The second jury found the existence of two statutory aggravating circumstances, the one found by the first jury [Ga. Code Ann. §27-2534.1 (b) (2)] and the additional aggravating circumstance that "...the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, or depravity of mind, or an aggravated battery;" [Ga. Code Ann. §27-2534.1 (b) (7)]. (2R 3).

Petitioner objected, at the second trial, to the jury being allowed to consider statutory aggravating circumstances other than the one found by the first jury (2T 291-292).

Petitioner's Enumeration of Error No. 6 brought the double jeopardy question to the Supreme Court of Georgia, and argument was made that Petitioner's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States of America were violated by allowing the second jury to find what had been already considered and found not to exist by the first jury. Brief of Appellant, Case No. 34020, Supreme Court of Georgia, pg. 13-14.

The Supreme Court of Georgia ruled that Petitioner's argument in this connection was without merit. Redd v. State, 242 Ga. 876, 883-885, 252 S.E. 2d 383.

The issue was raised in Petitioner's Petition for Writ of Certiorari in this Court, which was denied; Redd v. Georgia, 442 U.S. 934, 99 S.Ct. 2870, 61 L.Ed. 2d 304 (1979).

After this Court decided the case of Bullington v. Missouri, _____U.S._____, 101 S.Ct. 1852, 68 L.Ed. 2d

270 (1981) Petitioner filed a Petition for Writ of Habeas Corpus in the Superior Court of Butts County, Georgia, raising the double jeopardy question. The trial judge, relying on the Bullington case, reversed Petitioner's death sentence and ordered a new trial. (Appendix B, p. B7-B8). The Supreme Court of Georgia reversed the trial court, in an opinion issued April 6, 1982. Zant v. Redd, supra, Appendix A.

This Petition for Writ of Certiorari to the Supreme Court of Georgia followed, requesting this court review the judgment of the Supreme Court of Georgia.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

THE COURT SHOULD GRANT A WRIT OF CERTIORARI IN THIS CASE BECAUSE THE ISSUE PRESENTED WILL KEEP ARISING OVER AND OVER UNTIL THE QUESTION IS SETTLED.

The issue which will keep arising over and over is whether double jeopardy protection is afforded as to statutory aggravating circumstances in a death penalty case. Petitioner and the State Habeas Corpus trial court agree, relying on Bullington v. Missouri, supra, that such protection does apply. The Georgia death penalty statute, like the Missouri statute under consideration in the Bullington case, has the "...hallmarks of a trial on guilt or innocence." Bullington v. Missouri, supra, at 101 S.Ct. 1858. The statute provides for proof beyond a reasonable doubt of additional facts (one or more statutory aggravating circumstances), thus providing standards to guide the jury's descretion.

Furthermore, a statutory aggravating circumstance is certainly akin to a crime itself, in the ordinary case, because it is upon the jury's finding of the existence of a statutory aggravating circumstance that the death penalty may attach. This is especially true in the case of a re-trial on punishment; because, the only issue is life or death; and unless the jury finds a statutory aggravating circumstance beyond a reasonable doubt, a life sentence results. Ga. Code Ann. §27-2534.1 (c).

Petitioner submits that the rule of Bullington v. Missouri, supra, is to the effect that double jeopardy protection attaches to statutory aggravating circumstances in a death penalty case; and that, where the jury has failed to find a particular statutory aggravating circumstance submitted to it in a first sentencing trial, that particular statutory aggravating circumstance may not be re-submitted to a second jury.

Thus, the holding in Bullington, at 101 S.Ct. 1852, 1862:

> "Because the sentencing proceeding at Appellee's first trial was like the trial on guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury is also available to him, with respect to the death penalty, at his retrial. We therefore refrain from extending the reasoning of Stroud v. United States, 251 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103 (1919), to this very different situation."

This holding must be bottomed on the fact that the State of Missouri failed to prove the statutory aggravating circumstances in the first trial, because the Stroud case, mentioned in the holding, involved a situation in which a defendant was sentenced to death at his first trial, life imprisonment at his second trial after reversal of the first conviction, and to death at his third trial after reversal of the conviction and the sentence imposed at the second trial. The Supreme Court in Stroud found no Double Jeopardy Clause violation and affirmed the conviction and death sentence given at the third trial. Since Bullington does not overrule Stroud, it is clear that the telling factor in Bullington is not that a death penalty was being sought after a sentence of life imprisonment had been found by the first jury, but that the State in Bullington was attempting to prove something it had tried and failed to prove at the first trial.

That is exactly what happened in Petitioner's case, where the state was allowed to offer proof of two statutory aggravating circumstances which it had failed to prove to the first jury.[3/] Petitioner objected, at the trial, to the jury being allowed to consider statutory aggravating circumstances given to the first jury but which the first jury found did not exist.

3/ The Supreme Court of Georgia intimates in its opinion (Appendix A, p. A3-A4, supra) that the listing of one statutory aggravating circumstance by the first jury did not amount to an acquittal of the other statutory aggravating circumstances submitted to it. This reasoning flies in the face of the Georgia death penalty statute, which specifically requires the jury to list the statutory aggravating circumstances found beyond a reasonable doubt [§27-2534.1 (c)], and in the face of long-standing Georgia rule to the effect that a finding of guilty of one count of a two-count indictment amounts to acquittal of the other count (Hathcock v. State, 88 Ga. 91).

Furthermore, allowing the second jury to consider the statutory aggravating circumstances found not to exist by the first jury, cause the application of the Georgia death penalty statute to Petitioner to be a violation of the Eighth and Fourteenth Amendments' protection against cruel and unusual punishment. As stated by the trial judge in this habeas corpus case:

> "The ultimate question is whether the jury which handed down the death sentence was sufficiently guided in its deliberations to comply with the constitutional standard set forth in Furman v. Georgia, 408 U.S. 238,92 S.Ct. 2726, 33 L.Ed. 2d 346, reh. den. 409 U.S. 902, 93 S.Ct. 89, 34 L. Ed. 2d 164 (1972) and Gregg v. Georgia, supra. Is there substantial risk that the jury was affected in its decision by the submission to it of two aggravating circumstances which a prior jury had not found? It is inescapable that the jury was affected because it found (b) (7).
>
> How can one say that the jury was not swayed to the side of a death penalty by the erroneously submitted aggravating circumstances? How can one say that, without (b) (7), the jury would not have returned the death sentence?
>
> The Court must conclude that a substantial risk of unguided discretion existed. Rational review of the jury's sentence is impossible. See Burger v. Zant, No. 280-114 (S.D. Ga. decided April 29, 1981).4/ (Footnote and citation added).

4/ Burger v. Zant, 513 F. Supp. 772, (S.D. Ga. 1981).

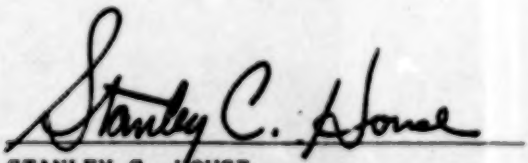
Accordingly, Petitioner's death sentence was not returned under the deliberate, channeled, guidelines required to eliminate constitutionally defective arbitrariness.

Because the Court can never know the extent to which the jury was swayed by the erroneous instructions, it is necessary that the risk of error be decided in Petitioner's favor. That the system maintain integrity is more important than the result of a particular case no matter how undeserving the defendant may be.

Petitioner's death sentence must be set aside." (Opinion of the trial court, Appendix B, p. B7-B8, supra.)

For the reasons mentioned by the trial judge in the quoted portion of his opinion, the error could not be harmless, and this Court should issue the Writ petitioned for, and should reverse the ruling of the Supreme Court of Georgia and reinstate the Order of the Habeas Corpus Court.

RESPECTFULLY SUBMITTED,



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APPENDIX A

Opinion of the Supreme Court of

Georgia, Zant v. Redd,

290 S.E. 2d 36

present when the action commenced was not the county of the parents' residence.[2] The recent revision of Ga.Const.1976, Art. VI, Sec. XIV, Par. VI (Code Ann. § 2-4306) had the effect of removing any constitutional impediment to the application of Code Ann. § 24A-1101 to cases such as the one now before us. Thus there is no longer any obstacle to the application of Code Ann. § 24A-1101 to termination proceedings, and the juvenile court erred in dismissing the petition below on the ground of improper venue. See 16 Am.Jur.2d, Constitutional Law, § 259; *People ex rel. McClelland v. Roberts*, 148 N.Y. 360, 42 N.E. 1082 (1896).

Judgment reversed.

All the Justices concur.

ZANT, Supt.

v.

REDD.

No. 38069.

Supreme Court of Georgia.

April 6, 1982.

Relief in habeas corpus was granted, and a death sentence for homicide was set aside, by the Butts County Superior Court, Alex Crumbley, J. On appeal by the State, the Supreme Court held that where jury had been instructed that death penalty statute required finding of only one aggravating circumstance in order to impose death penalty, jury's listing of one of three aggravating circumstances in support of death penalty did not amount to "acquittal" of other two, and double jeopardy did not preclude submission, to second sentencing jury, of four aggravating circumstances, including the three submitted to first jury plus additional one which judge felt was supported by evidence.

Reversed.

Hill, P. J., filed a specially concurring opinion.

1. Criminal Law ⇐186

Where jury in homicide case was instructed that death penalty statute required finding of only one aggravating circumstance in order to impose death penalty, jury's listing of one of three aggravating circumstances in support of death penalty did not amount to "acquittal" of other two, and double jeopardy did not preclude submission, to second sentencing jury, of four aggravating circumstances, including the three submitted to first jury plus additional one which judge felt was supported by evidence. Code, § 27-2534.1(c); U.S.C.A. Const.Amend. 5.

2. Criminal Law ⇐1208(1)

Aggravating circumstances are procedural standards designed to control jury's discretion in capital cases in order to ensure against capricious and arbitrary enforcement of the death penalty. Code, § 27-2534.1(c).

3. Criminal Law ⇐1190

On trial on issue of guilt or innocence, if defendant is found guilty and convicted but overturns his conviction on legal grounds, slate is wiped clean, conviction nullified, and state and defense start anew, and such rule is applicable to sentencing phase of trial as well. Code, § 27-2534.1(c); U.S.C.A.Const.Amend. 5.

4. Criminal Law ⇐1208(1)

If defendant overturns his death sentence on technical grounds, sentence is nullified and state and defense start anew and,

2. After our decision in *Quire*, we held that a deprivation proceeding could be brought in the county in which the child was present when it was commenced, under Code Ann. § 24A-1101, where the only known parent was not a resident of Georgia. *In the Interest of M. A. C.*, 244 Ga. 645(2), 261 S.E.2d 880 (1979).

on resentencing, state may again seek death penalty and offer any evidence on aggravating circumstances in support thereof and defendant, likewise, is entitled to bring to jury any mitigating circumstances available to him, including those not known or utilized at first sentencing trial. U.S.C.A. Const.Amend. 5; Code, § 27-2534.1(c).

Michael J. Bowers, Atty. Gen., Daryl A. Robinson, Staff Asst. Atty. Gen., for Walter D. Zant, Supt.

Stanley C. House, Augusta, for Bob Redd.

PER CURIAM.

1. Appellee's motion to dismiss is denied. *Reed v. Hopper*, 235 Ga. 298(5), 219 S.E.2d 409 (1975).

2. This case presents the issue of whether double jeopardy attaches to aggravating circumstances in a death penalty case.

The appellee was convicted of murder and kidnapping and was sentenced to die for the murder. On appeal Redd's conviction was affirmed, but his death sentence was reversed on technical grounds and a new sentencing trial was ordered. See, *Redd v. State*, 240 Ga. 753, 243 S.E.2d 16 (1978). On resentencing, the death penalty was again imposed. This sentence was affirmed on appeal to this Court. *Redd v. State*, 242 Ga. 876, 252 S.E.2d 383 (1979).

In June of 1981, Redd filed a habeas corpus petition in Butts County Superior Court alleging that on resentencing the consideration by the jury of certain statutory aggravating circumstances was in violation of the double jeopardy clause.

At Redd's first sentencing trial, three aggravating circumstances were submitted to the jury. The jury imposed the death sentence but only listed one aggravating circumstance in support thereof.

The second sentencing jury was authorized to consider four aggravating circumstances—the three submitted to the first jury plus an additional one the judge felt was supported by the evidence.

[1] Redd, relying on *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), argued on habeas that the first jury, by not listing two of the three submitted statutory aggravating circumstances in support of the death penalty, essentially "acquitted him of those two;" thereby, making it a violation of the double jeopardy clause for the state to have offered proof on and for the second jury to have considered them on resentencing.

Redd did not contend that the state could not reseek the death penalty, for *Bullington* clearly allows for it where a death penalty which is first imposed is set aside on legal grounds. See, *Godfrey v. State*, 248 Ga. 616(1), 284 S.E.2d 422 (1981). Neither did Redd complain of the submission to the second sentencing jury of the *one* aggravating circumstance found by the first jury or of the one *not* submitted to that jury.

The habeas trial judge, also relying on *Bullington v. Missouri*, agreed with Redd's arguments and set aside his death sentence. The state appeals, and we reverse.

Redd argues that *Bullington* mandates that we affirm the reversal of his death sentence. *Bullington* is the first case in which the United States Supreme Court has held the double jeopardy clause to be applicable to the sentencing phase of a criminal trial. In *Bullington*, the court held that the imposition of a life sentence by the first jury was an "acquittal" of the death sentence. Therefore, the court held that for the state to seek the death penalty on resentencing would be in violation of the double jeopardy clause.

The basis of the Supreme Court's ruling in *Bullington* was that the procedure involved in sentencing under Missouri's death penalty statute closely resembled that of a trial on guilt or innocence. The court emphasized that the jury was presented with two alternatives, life or death, and that to impose death the jury had to find certain facts beyond a reasonable doubt. The court felt that this sentencing procedure required the jury to determine if the state had "proved its case" when seeking to impose the death penalty. Consequently, the court

reasoned that a sentence of life amounted to an "acquittal" of the death penalty. In conclusion, the court ruled that an "acquittal" on sentencing should be accorded the same finality as an "acquittal" on guilt or innocence.

We find that this reasoning does not apply to aggravating circumstances and does not mandate a ruling that the failure of a jury to list certain aggravating circumstances in support of the death penalty amounts to an "acquittal" of those circumstances.

An alternative process is not involved in a jury's consideration of aggravating circumstances. The Georgia death penalty statute only requires a finding of one aggravating circumstance in order to impose the death penalty (Code Ann. § 27-2534.1(c)), and the jury in this case was so instructed. The jury's decision with regard to aggravating circumstances is not a mutually exclusive one as it is with regard to the choice of life or death. Consequently, we cannot say, as the Supreme Court did with regard to the choice of life or death, that the listing of only one of three aggravating circumstances in support of the death penalty is an "acquittal" of the other two. The procedural basis which led the court to its decision in *Bullington* does not exist in this case.

Even if the decision on aggravating circumstances involved an alternative process, we would refrain from applying the double jeopardy clause to aggravating circumstances as the principles involved in double jeopardy do not warrant its application to them.

In *Green v. United States*, 355 U.S. 184, 187, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957) the United States Supreme Court noted that "the constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." In addition, the Supreme Court in *Bullington*, noting the values that underlie the double jeopardy rule, quoted the following language from the *Green* decision:

> "'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continued state of anxiety and insecurity, as well as enhancing the possibility, that even though innocent he may be found guilty.' *Green v. United States*, 355 U.S. 184, 187–188, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957)."

The Supreme Court in *Bullington* stated that the above principles applied equally to the question of whether the defendant deserved to die as it did to the question of guilt or innocence. The court essentially equated the question of life or death to an offense and found that a decision of life or death deserved the same finality as a decision on guilt or innocence. It noted that the defendant faces "'embarrassment, expense and ordeal'" and "'anxiety and insecurity'" when facing the death penalty.

We refrain from equating "aggravating circumstances" to an offense. See, *Ezell v. State*, 242 Ga. 876, 885, 252 S.E.2d 388 (1979); *Green v. State*, 246 Ga. 508(8), 272 S.E.2d 475 (1980).

[2] Aggravating circumstances are procedural standards designed to control a jury's discretion in capital cases in order to ensure against capricious and arbitrary enforcement of the death penalty. *See, Gregg v. Georgia*, 428 U.S. 153, 197–98 (1976) 96 S.Ct. 2909, 2936, 49 L.Ed.2d 859 (1976), reh. den., 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976). Aggravating circumstances are not substantive "penalties" or "offenses"; they do not place the defendant's life in peril or subject him to a possible "conviction"; they are standards which guide a jury's decision on what does place the defendants life in jeopardy at the sentencing trial—the death penalty.

[3] As we have determined that double jeopardy does not apply to aggravating cir-

cumstances, we apply the established double jeopardy rule to the sentencing phase of Redd's trial, i.e., that on a trial on guilt or innocence, if a defendant is found guilty and convicted but overturns his conviction on legal grounds, the state is wiped clean, the conviction nullified, and the state and the defense start anew. *Godfrey v. State*, 248 Ga. 616(1), 284 S.E.2d 422 (1981); *North Carolina v. Pearce*, 395 U.S. 711, 720–21, 89 S.Ct. 2072, 2078, 23 L.Ed.2d 656 (1969); *United States v. Tateo*, 377 U.S. 463, 466, 84 S.Ct. 1587, 1589, 12 L.Ed.2d 448 (1963).

[4] Applying this principle to a sentencing hearing in a death penalty case, the following rule emerges: if a defendant overturns his death sentence on technical grounds, the sentence is nullified and the state and the defense start anew. Consequently, on resentencing the state may again seek the death penalty and may offer any evidence on aggravating circumstances in support thereof. Likewise, the defendant is entitled to bring to the jury any mitigating circumstances available to him, including those not known or utilized at the first sentencing trial. In accordance with that reasoning, we held in *Godfrey* that if a defendant overturns his death sentence on legal grounds, the death penalty may be sought on resentencing, and the state may offer proof of statutory aggravating circumstances not offered at the first trial. We take that reasoning one step further and hold that on resentencing in this case the state acted properly in offering proof of statutory aggravating circumstances submitted to the first jury but not listed by that jury in support of the death sentence.

Judgment reversed.

All the Justices concur, except HILL, P. J., who concurs specially.

HILL, Presiding Justice, concurring specially.

In Redd's first sentencing trial, three aggravating circumstances were submitted to the jury: (1) The offense of murder was committed while the defendant was engaged in the commission of the capital felony of kidnapping with bodily injury [Code Ann. § 27–2534.1(b)(2)]; (2) the offense of murder was outrageously or wantonly vile or inhuman in that it involved torture, or depravity of mind, or an aggravated battery [Code Ann. § 27–2534.1(b)(7)]; and (3) the offense of murder was committed while the offender was engaged in the commission of the capital felony of armed robbery [Code Ann. § 27–2534.1(b)(2)]. See *Redd v. State*, 242 Ga. 876, 883, 252 S.E.2d 383 (1979), cert. denied, 442 U.S. 934, 99 S.Ct. 2870, 61 L.Ed.2d 304. The jury returned a recommendation of death based only on the aggravating circumstance that the murder was committed while Redd was engaged in the capital felony of kidnapping with bodily injury. We reversed this death sentence because the jury was not adequately instructed concerning their option to recommend life imprisonment even if they found the presence of a statutory aggravating circumstance. *Redd v. State*, 240 Ga. 753(7), 243 S.E.2d 16 (1978). See also *Hawes v. State*, 240 Ga. 227, 240 S.E.2d 833 (1977); *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1977).

In the resentencing trial, the jury was permitted to consider four aggravating circumstances, the same three charged in the original trial plus Code Ann. § 27–2534.1(b)(4) (the offense of murder was committed for the purpose of receiving money). *Redd v. State*, supra, 242 Ga. at 883 n. 2, 25. S.E.2d 383. The jury again found in favor of the death penalty, this time based on both the aggravating circumstance of kidnapping with bodily injury [(b)(2)] and the aggravating circumstance that the murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery [(b)(7)].

I agree that because this is a case where the defendant's first death sentence was reversed due to trial error, the resentencing jury was free to again recommend the death penalty. Cf., *North Carolina v. Pearce*, 395 U.S. 711, 719–20, 89 S.Ct. 2072, 2077–78, 23 L.Ed.2d 656 (1969). Compare *Godfrey v. State*, 248 Ga. 616, 625–26, 284

S.E.2d 422 (1981) (Hill, P. J., dissenting). For the following reason, I also agree that the habeas court erred in setting aside the death sentence imposed by the resentencing jury in this case.

The first sentencing jury returned the aggravating circumstance of kidnapping with bodily injury and this finding was not reversed due to insufficient evidence. It did not violate double jeopardy to resubmit this aggravating circumstance to the second jury or for them to impose the death penalty based upon it. Under our cases, when two or more aggravating circumstances are returned by the jury in recommending a death sentence, the failure of one aggravating circumstance does not invalidate the other aggravating circumstance or the death sentence. *Stevens v. State*, 247 Ga. 698, 708-09, 278 S.E.2d 398 (1981); *Burger v. State*, 245 Ga. 458, 462, 265 S.E.2d 796 (1980), cert. denied, 446 U.S. 968, 100 S.Ct. 2975, 64 L.Ed.2d 847. Because the habeas court therefore erred in setting aside Redd's death sentence, regardless of whether it was error to submit aggravating circumstance (b)(7) to the resentencing jury, I would not reach the issue discussed at length in the majority opinion.

Willie ANDERSON

v.

STATE.

No. 38379.

Supreme Court of Georgia.

April 6, 1982.

Defendant was convicted in the Chatham Superior Court, Frank S. Cheatham, Jr., J., of murder, and he appealed. The Supreme Court, Hill, P. J., held that: (1) the State could introduce evidence that the defendant had fired at another, but missed, even though the defendant argued that the evidence was evidence of separate crime, and (2) it was not error for the trial court to fail to give the defendant's requested instruction on involuntary manslaughter.

Judgment affirmed.

1. Criminal Law ⇐369.2(8)

In murder prosecution, State could introduce evidence that defendant had fired at another, but missed, even though defendant claimed that the evidence was inadmissible as evidence of separate crime, since evidence of defendant's conduct at scene of crime, even after commission of crime, was relevant and admissible.

2. Homicide ⇐329(2)

In murder prosecution, trial court did not err in failing to give defendant's instruction on voluntary manslaughter. Code, § 26-1105(a, b).

Stephen H. Harris, Savannah, for Willie Anderson.

Spencer Lawton, Dist. Atty., Savannah, Michael J. Bowers, Atty. Gen., for the State.

HILL, Presiding Justice.

The defendant, Willie Anderson, was convicted of murdering Willert Magee and was sentenced to life imprisonment.

The state's evidence authorized the jury to find that on October 18, 1979, the victim and Teresa Wallace, the defendant's former girlfriend, were at a fast-food restaurant in Savannah. While the victim was waiting in line at the take-out window and Ms. Wallace was waiting in the car, the defendant stepped out from behind a van in the parking lot and shot the victim two times in the back with a pistol. Ms. Wallace then got out of the car and ran into the restaurant. As she was running, the defendant fired at her but missed. The defendant followed her into the restaurant, pointed his pistol at her and pulled the trigger several more

APPENDIX B

Opinion of the Trial Court

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

BOB REDD,	:	
	:	
PETITIONER	:	
	:	HABEAS CORPUS
VS.	:	FILE NO. 5101
	:	
WALTER D. ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	:	
	:	
RESPONDENT	:	

ORDER

Petitioner was convicted of Murder and Kidnapping. He was sentenced to death for the Murder and to life imprisonment for the Kidnapping. The Supreme Court affirmed both convictions but vacated the death sentence for Murder and required a new trial on the sole issue of punishment for murder. Redd v. State, 240 Ga. 753 (1978). Upon resentencing, Petitioner again received the death sentence, which sentence was affirmed by the Supreme Court. Redd v. State, 242 Ga. 876 (1979). Certiorari was denied by the Supreme Court of the United States. Redd v. Georgia, 442 U.S. 934, 99 S.Ct. 2870, 61 L.Ed.2d 304 (1979).

He filed a petition for habeas corpus in Tattnall Superior Court which was denied on April 8, 1980. The Supreme Court of Georgia denied the Application for Certificate of Probable Cause to Appeal on July 2, 1980. Certiorari was denied

by the Supreme Court of the United States. Redd v. Balkcom, ____ U.S.____, ____S.Ct.____, 66 L.Ed.2d 238 (1980).

On June 10, 1981, this Court was presented with Petitioner's Motion for Stay of Execution along with this Petition for Writ of Habeas Corpus. The Court granted the Motion. As to the Petition, the Court determined the Petition appeared to raise legal issues which the Court would consider by written briefs as an evidentiary hearing did not appear necessary.

THE ISSUE OF SUCCESSION

Georgia law requires that a habeas petitioner raise all grounds for relief in his original or amended petition. Any grounds not so raised are waived unless the Constitution otherwise requires or the Judge, on considering a subsequent petition, "...finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition." Ga. Code Ann. §50-127(10).

The Court knows of no Constitutional provision requiring that a successive petition be heard; therefore, the issue is whether, upon considering this petition, the Court finds grounds for relief which could not reasonably have been raised in Petitioner's first habeas case.

Three grounds are involved:

(1) Exclusion of a Juror for Cause Because of Opposition to Capital Punishment.

(2) Resubmission of Aggravating Circumstances in Petitioner's Resentencing Trial Not Found in His First Trial.

(3) The Jury Charge on Mitigating Circumstances at the Resentencing Trial.

While all of these points could have been raised in Petitioner's first habeas, Petitioner does present arguments based on recent cases which, under his theory of the law, represent intervening changes in the law since the first habeas petition. For this reason, the Court will not deem this petition as successive and will decide the three points on their merit.

1.

Petitioner claims constitutional violation by the allegedly improper exclusion of a juror for cause concerning opposition to capital punishment. He admits this issue was decided adversely to him on direct appeal. Redd v. State, 242 Ga. at 878. Yet, Petitioner claims the decision of Adams v. Texas, ____ U.S. ____, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), handed down after his original habeas, is sufficient authority to raise the issue again.

Petitioner's reliance upon Adams, however, is misplaced. In Adams, the Supreme Court merely concluded that jurors were being excluded under the Texas death penalty statute on grounds broader

than the limits on a state's power to exclude as promulgated in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

With Adams leaving the Witherspoon inquiry intact and this issue having already been decided under Witherspoon, the Court finds Petitioner's first ground to be without merit.

2.

Resubmission of Aggravating Circumstances in Petitioner's Resentencing Trial Not Found in His First Trial.

Petitioner claims his protection against Double Jeopardy, under the Fifth and Fourteenth Amendments to the United States Constitutuion, was violated by the resubmission of aggravating circumstances in his resentencing trial that were not found by the jury in his initial trial. Again Petitioner points out that this issue was decided adversely to him on direct appeal when the Supreme Court concluded aggravating circumstances are not offenses within the meaning of the Double Jeopardy Clause. Redd v. State, 242 Ga. at 885. Petitioner contends, however, that the recent decision of Bullington v. Missouri, No. 79-6740 (U.S. May 4, 1981), compels this Court to reach a different result.

The focal point in Bullington was the sentencing phase of the bifurcated trial procedure under Missouri's death penalty statute. In Bullington's first trial, the jury had not found either of two statutory aggravating circumstances and returned a life sentence. When a new

trial on punishment became necessary for other reasons, the State again sought the death penalty upon the same aggravating circumstances. The Supreme Court found the sentencing proceeding was like a trial on the issue of guilt and innocence because the prosecution was required to prove the existence of any aggravating circumstance beyond a reasonable doubt. The Court concluded the Double Jeopardy Clause barred the State's second attempt to obtain a death sentence because the life sentence meant "the jury has already acquitted the defendant of whatever was necessary to impose the death sentence." Bullington v. Missouri, supra, slip op. at 14.

Petitioner urges that the jury's failure to find the existence of two aggravating circumstances at his first trial is, under Bullington, an acquittal of the two and that the trial court erred in allowing the jury to consider the same two aggravating circumstances at his second trial. He claims additional harm from the finding of the Ga. Code Ann. §27-2534.1(b)(7) aggravating circumstances at his second trial which was charged upon but not found by the jury at his first trial.

While Bullington is not factually identical to this case, it is important because the rule of law is established that the Double Jeopardy Clause does apply to the sentencing phase of a bifurcated capital sentencing system. That is to say, where the State tries and fails to obtain a death sentence at the original trial, it is barred by the Double

Jeopardy Clause from seeking and obtaining a death sentence at a subsequent trial.

The issue presented here is more narrow. It involves whether, at a retrial on the issue of punishment, the State is barred from seeking and the Court from submitting to the jury aggravating circumstances not found by the jury at the original sentencing trial; and whether the submission to the jury of an aggravating circumstance not found at the original sentencing trial so taints the procedure that a second death sentence grounded partially on such aggravating circumstance must be set aside.

Under Bullington, it was error for the Court to submit to the jury two aggravating circumstances not found by the first sentencing jury.

But does this error take on constitutional proportions in light of the fact that one aggravating circumstance [kidnapping with bodily injury] was found by both sentencing juries?

The Supreme Court of Georgia has said not. Gregg v. Georgia, 233 Ga. 117, 127-128 (1974); Gates v. State, 244 Ga. 587, 599 (1979).

However, the United States Court of Appeals for the Fifth Circuit reached a different result in Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980). In Stephens, the jury had found the existence of three aggravating circumstances and returned a death sentence; 631 F.2d at 405. In the interval between Stephens' trial and appeal, the Supreme Court declared one of the aggravating circumstances unconstitutional in a separate case. Id. Upon review of Stephens' case,

the Supreme Court upheld the two remaining aggravating circumstances and held the death sentence was not impaired. Id. The Court of Appeals reached a contrary result on the issue because they could not determine "with the degree of certainty required in capital cases that the evidence of those convictions [the invalid aggravating circumstance], together with the instruction, did not make a critical difference in the jury's decision to impose the death penalty". 631 F.2d at 406.

The ultimate question is whether the jury which handed down the death sentence was sufficiently guided in its deliberations to comply with the constitutional standard set forth in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, reh. den. 409 U.S. 902, 93 S.Ct. 89, 34 L.Ed.2d 164 (1972) and Gregg v. Georgia, supra. Is there substantial risk that the jury was affected in its decision by the submission to it of two aggravating circumstances which a prior jury had not found? It is inescapable that the jury was affected because it found (b)(7).

How can one say that the jury was not swayed to the side of a death penalty by the erroneously submitted aggravating circumstances? How can one say that, without (b)(7), the jury would not have returned the death sentence?

The Court must conclude that a substantial risk of unguided discretion existed. Rational review

of the jury's sentence is impossible. See Burger v. Zant, No. 280-114 (S.D. Ga. decided April 29, 1981).

Accordingly, Petitioner's death sentence was not returned under the deliberate, channeled, guidelines required to eliminate constitutionally defective arbitrariness.

Because the Court can never know the extent to which the jury was swayed by the erroenous instructions, it is necessary that the risk of error be decided in Petitioner's favor. That the system maintain integrity is more important than the result of a particular case no matter how undeserving the defendant may be.

Petitioner's death sentence must be set aside.

3.

The Jury Charge on Mitigating Circumstances at the Resentencing Trial.

In his final ground, Petitioner claims the trial court erred in mentioning certain mitigating circumstances. Petitioner contends this issue could not have been raised in his original petition because the authority relied upon, Collier v. State, 244 Ga. 533 (1979), was decided after his first habeas.

The relevant portion of the jury instruction is as follows:

> "Mitigating circumstances
> are those circumstances
> which do not constitute

> a justification or excuse for the crime, such as low intelligence or intoxication, but which may be considered as extenuating or reducing the moral culpability or blame."
>
> (T.T. 286).

Petitioner contends under the authority of Collier v. State, supra, that this charge limits consideration of mitigating circumstances.

Collier held simply that it was not reversible error for a trial judge to refuse to give a requested charge pointing out specific mitigating circumstances. The Supreme Court has held on several occasions the trial court is not required to single out mitigating circumstances. Thomas v. State, 240 Ga. 393, 401 (1977); Potts v. State, 241 Ga. 67, 86 (1978); Gates v. State, supra, at 597.

The issue here is whether the use of examples of mitigating circumstances by the trial court without request unconstitionally limits the jury's consideration of all mitigating circumstances in a case. Collier does contain some unfortunate dicta indicating it is better not to cite examples. The Court does not regard the dictum as a rule of law. Surely the Supreme Court would not have meant for the affordance or deprivation of constitutional rights to depend on this question. The use of examples could only help rather than hurt. Dictum that it is better practice not to does not mean the Supreme Court finds that due process is violated by pointing out examples.

Pointing out examples does not limit the consideration of something else.

It is true that it is impermissible to limit consideration of mitigating circumstances. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Bell v. Ohio, 438 U.S. 637, 98 S.Ct. 2977, 57 L.Ed.2d 1010 (1978); Green v. State, 242 Ga. 261 (1978). However, all these cases involved the exclusion of evidence concerning mitigating circumstances. The charge in this case does not limit consideration of mitigating circumstances.

Accordingly, this allegation is found to be without merit.

CONCLUSION

For the reasons articulated in division (2), the Petition is granted as to the sentence of death. Petitioner is remanded to the custody of the Respondent to be transported to the trial court for another sentencing trial or for resentencing to a term of life imprisonment.

SO ORDERED, this 15 day of September, 1981.

Alex Crumbley

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

NO. 81-6827

Office-Supreme Court, U.S.
FILED
JUL 6 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BOB REDD,

Petitioner,

v.

WALTER ZANT,
SUPERINTENDENT,
GEORGIA DIAGNOSTIC
AND CLASSIFICATION
CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under Georgia law, when an accused has received a sentence of death and has had the punishment set aside, may the trial court at the resentencing proceedings instruct the jury on all statutory aggravating circumstances supported by the evidence?

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BOB REDD,

Petitioner,

v.

WALTER ZANT,
SUPERINTENDENT,
GEORGIA DIAGNOSTIC
AND CLASSIFICATION
CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

Petitioner, Bob Redd, was indicted in Augusta, Richmond County, Georgia, in 1976 for the kidnapping and murder of Paul D. Eskew, Sr. The evidence showed that Redd abducted Eskew, drove away in an automobile, and while Eskew pleaded to be returned slashed him in the face with a knife. Shortly thereafter, having turned off onto a dirt road, petitioner took a tire tool and hammer from the trunk of the automobile and mercilessly beat Eskew in the head and face. Not yet content, petitioner slashed the victim's throat twice.

Forcing his young companion, John Morris, who was borderline retarded, to assist him, Redd dragged the body behind the tree where he undressed it and commenced slashing the victim's buttocks with a knife while cursing the dead man.

Months later, a badly decomposed body was found and ultimately identified as Eskew.

Petitioner was originally convicted and sentenced to death. On mandatory appeal to the Supreme Court of Georgia the conviction was affirmed but the death penalty was vacated. Redd v. State, 240 Ga. 753, 243 S.E.2d 16 (1978).[1/] Redd was retried on the issue of punishment and resentenced to death. Again, the Supreme Court of Georgia performed its mandatory statutory review, this time affirming the death penalty. Redd v. State, 242 Ga. 876, 252 S.E.2d 383 (1979). On June 11, 1979, this Court denied the petition for a writ of certiorari. Case No. 78-6462.

1/ The death sentence was set aside "for failure of the trial court to make clear to the jury in his charge taken as a whole that they might in their discretion recommend a life sentence even if they found the existence of a statutory aggravating circumstance." Redd v. State, 240 Ga. at 757. Therefore, the state was not precluded from again seeking the death penalty.

Redd thereafter sought habeas corpus relief in state courts and it was denied. His application for a certificate of probable cause to appeal to the Supreme Court of Georgia was also denied. On November 3, 1980, this Court again denied Redd's petition for a writ of certiorari. Case No. 80-5317.

Redd filed a second state habeas corpus petition following this Court's decision in Bullington v. Missouri, ___U.S.___, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). The state habeas corpus court granted relief. On appeal, the Supreme Court of Georgia reversed, reinstating the death penalty. It is from this decision that Redd has filed his petition in this Court for a writ of certiorari.

REASONS FOR NOT GRANTING THE WRIT

I. UNDER GEORGIA LAW, WHEN AN ACCUSED HAS RECEIVED A SENTENCE OF DEATH AND HAS HAD THE PUNISHMENT SET ASIDE, THE TRIAL COURT IS NOT ONLY AUTHORIZED BUT REQUIRED AT THE RESENTENCING PROCEEDINGS TO INSTRUCT THE JURY ON ALL STATUTORY AGGRAVATING CIRCUMSTANCES SUPPORTED BY THE EVIDENCE.

The issue presented to this Court was presented below both to the state habeas court and to the Supreme Court of Georgia on appeal. The state supreme court recounted the following procedural history:

> In June of 1981, Redd filed a habeas corpus petition in Butts County Superior Court alleging that on resentencing the consideration by the jury of certain statutory aggravating circumstances was in violation of the double jeopardy clause.
>
> At Redd's first sentencing trial, three aggravating circumstances were submitted to the jury. The jury imposed the death sentence but only listed one aggravating circumstance in support thereof.
>
> The second sentencing jury was authorized to consider four aggravating circumstances

> -- the three submitted to the first jury plus an additional one the judge felt was supported by the evidence.

Zant v. Redd, ___Ga. ___, 290 S.E.2d 36 (1982). Specifically, at the first trial the jury was authorized to consider (1) that the murder was committed during the commission of kidnapping with bodily injury (Ga. Code Ann. § 27-2534.1(b)(2), (2) that the murder was outrageously or wantonly vile or inhuman in that it involved torture, or depravity of mind, or an aggravated battery (Ga. Code Ann. § 27-2534.1(b)(7), and (3) that the murder was committed during the commission of an armed robbery (Ga. Code Ann. § 27-2534.1(b)(2).

> . . . In recommending the sentence of death, the jury listed only one of the three aggravating circumstances that were charged by the trial judge-- the offense of murder was committed while defendant was engaged in the commission of another capital felony, kidnapping with bodily injury.
>
> Upon resentencing, the trial court charged that the jury was authorized to consider the same three statutory aggravating circumstances as listed above. [The jury was also authorized to consider upon resentencing the additional statutory aggravating circumstance, that the offense of murder was committed for the purpose of receiving money. Ga. Code Ann. § 27-2534.1(b)(4).] The jury recommended

> sentencing [Redd] to death but this time listed in support thereof two statutory aggravating circumstances; one which the jury found to exist at the first trial of the case -- the offense of murder was committed while defendant was engaged in the commission of another capital felony, kidnapping with bodily injury; the other being one that was previously charged at the first trial but not listed by the jury in support of the death sentence imposed in that case -- the offense of murder was outrageously or wantonly vile, horrible or inhumane [sic] in that it involved torture, depravity of mind or an aggravated battery.

Redd v. State, 242 Ga. 876, 883-84, 252 S.E.2d 383 (1979).

In his second state habeas corpus petition Redd relied on this Court's recent decision in Bullington v. Missouri, ___U.S.___, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), alleging that he had been "acquitted" of the two statutory aggravating circumstances not listed on the verdict of the first jury.

In Bullington, at the original trial on sentencing, the jury, apparently finding no aggravating circumstances, imposed a life sentence. The accused obtained a new trial as to guilt, and this Court held that the prosecution could not again seek the death penalty because jeopardy had attached.

> . . . Given these considerations, our decision today does not at all depend upon the State's announced intention to rely only upon the aggravating circumstances it sought to prove at petitioner's first trial or upon its statement that it would introduce no new evidence in support of its contention that petitioner deserves the death penalty. Having received "one fair opportunity to offer whatever proof it could assemble," Burks v. United States, 437 U.S., at 16, 57 L.Ed.2d 1, 98 S.Ct. 2841, the State is not entitled to another.

Bullington v. Missouri, 68 L.Ed.2d at 283. The Supreme Court of Georgia has similarly held that a death penalty is disproportionate if imposed on an accused who received a life sentence at a previous trial. Ward v. State, 239 Ga. 205, 208-09, 236 S.E.2d 365 (1977). Ward was not decided on double jeopardy grounds.

Thus, Bullington is not, as petitioner has asserted, "on all fours" with the present case. Redd was not "acquitted," if that is the appropriate term, at the sentencing phase of his trial. On the contrary, based upon the evidence before it, the jury sentenced Redd to death. Whereas this Court in Bullington found the trappings of a sentencing trial in a capital case to be similar to a trial on guilt or innocence, thus finding jeopardy where one previously has been sentenced to life rather than death, this case presents no such circumstance. Rather, the sentencing jury at Redd's original trial not only found evidence to convict but evidence sufficient to impose the death penalty. Therefore, there is no question of jeopardy having attached in the sense of prohibiting a subsequent death penalty from being imposed.

Neither does Bullington hold particular aggravating circumstances to be subject to the prohibition against double jeopardy. Whether the State intended to rely on the same statutory circumstances was irrelevant to the determination of the case; the concern was that the first jury had heard the evidence and apparently had found nothing sufficient to warrant imposition of the death penalty. On the other hand, in this case the original sentencing jury obviously found evidence sufficient to warrant imposition of the death penalty.

This Court in Bullington did not alter the long-standing decisions of the Supreme Court of Georgia that statutory aggravating circumstances are not elements of the capital crimes charged, nor are they part of the facts involved in the proof of the capital crimes whose death sentences they accompany. Aggravating circumstances are procedural guidelines to be used in deciding whether to execute a person already convicted of a capital crime. The purpose is to increase the rational nature of the discretionary sentencing deliberation. See, e.g., Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1973). ". . . [S]tatutory aggravating circumstances . . . are not offenses within the meaning of the double jeopardy clause but are charged a jury in order to guide them in their determination of whether a defendant should be given a life or death sentence." Redd v. State, 242 Ga. at 885 (emphasis in original).

As the Supreme Court of Georgia noted in reinstating the death penalty:

> . . .The Georgia death penalty statute only requires a finding of one aggravating circumstance in order to impose the death penalty . . ., and the jury in

this case was so instructed. The jury's decision with regard to aggravating circumstances is not a mutually exclusive one as it is with regard to the choice of life or death. Consequently, we cannot say, as the Supreme Court did with regard to the choice of life or death, that the listing of only one of the three aggravating circumstances in support of the death penalty is an "acquittal" of the other two. The procedural basis which led the court to its decision in Bullington does not exist in this case.

Zant v. Redd, supra, slip opinion at 3-4. The court continued:

> Aggravating circumstances are procedural standards designed to control a jury's discretion in capital cases in order to ensure against capricious and arbitrary enforcement of the death penalty [citing Gregg v. Georgia, 428 U.S. 153, 197-98 (1976)]. Aggravating circumstances are not substantive"penalties" or "offenses"; they do not place the defendant's life in peril or subject him to a possible "conviction"; they are standards which guide a jury's decision on what does place the defendant['s] life in jeopardy at the sentencing trial -- the death penalty.

> As we have determined that double jeopardy does not apply to aggravating circumstances, we apply the established double jeopardy rule to the sentencing phase of Redd's trial, i.e., that on a trial on guilt or innocence, if a defendant is found guilty and convicted but overturns his conviction on legal grounds, the slate is wiped clean, the conviction nullified, and the state and the defense start anew. [Citations omitted]

Id. at 5.

When an accused has received the death penalty and has had the punishment set aside, the state should be able to have the trial court charge on any aggravating circumstance which is supported by the evidence. The language of Ga. Code Ann. § 27-2534.1(b) requires it:

> In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider . . . any of the following statutory aggravating circumstances which may be supported by the evidence . . . . (Emphasis supplied)

For the trial court not to charge on an aggravating circumstance supported by the evidence is to lend credence to the charge that juries are given unguided discretion in deciding whether to impose the death penalty.

Therefore, it has been made clear by the Supreme Court of Georgia that under Georgia's death penalty statute, statutory aggravating circumstances are not offenses or elements of offenses but are guidelines to guide the jury in the exercise of its discretion in determining punishment as required by previous decisions of this Court. See, e.g., Gregg v. Georgia, supra. "Consequently, on resentencing the State may again seek the death penalty and may offer any evidence on aggravating circumstances in support thereof. Likewise, the defendant is entitled to bring to the jury any mitigating circumstances available to him, including those not known or utilized at the first sentencing trial. . . . [I]n this case the state acted properly in offering proof of statutory aggravating circumstances submitted to the first jury but not listed by that jury in support of the death sentence." Zant v. Redd, supra at 6.

CONCLUSION

No sufficient reason having been presented the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Daryl A. Robinson, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for Respondent in Opposition upon Petitioner's attorney by depositing a copy of this Brief in the United States mail, with proper address and adequate postage to:

Mr. Stanley C. House
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This 9th day of July, 1982.

Daryl A. Robinson
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